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THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

GILA RIVER INDIAN COMMUNITY, a federally-recognized Indian tribe; and GILA RIVER HEALTH CARE CORPORATION, a wholly-owned and subordinate entity of the Gila River Indian Community, Plaintiffs, v. UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; and ROBERT A. McDONALD, Secretary, United States Department of Veterans Affairs, Defendants.	No. 2:16-cv-00772-ROS **RESPONSE TO MOTION TO DISMISS** **ORAL ARGUMENT REQUESTED**

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INTRODUCTION

The United States has a trust obligation to provide health care to Native Americans, including Native American veterans. In the Gila River Indian Community ("Community"), the provision of health care under the trust obligation has been assumed by the Community under a self-governance compact with the United States, with health care services provided by the Gila River Health Care Corporation ("GRHCC"). Historically, however, federal budgets for Native American health care services have been grossly underfunded. Congress took steps over the years to address this funding crisis, primarily by relieving the burden of payment for health care services on the Indian Health Service ("IHS"), Indian tribes and tribal organizations. In 1999, the federal "payer of last resort" regulation was adopted to confirm that IHS would pay secondary to other program and private insurance "notwithstanding any State or local law to the contrary." 42 C.F.R. § 136.61.

Two amendments previously offered to the Indian Health Care Improvement Act

were designed to address these issues—codifying the payer of last resort rule and requiring the VA to reimburse Indian tribes and tribal organizations for health care services provided to eligible veterans. These two amendments were ultimately adopted as part of the Patient Protection and Affordable Care Act ("ACA") in 2010. The VA strongly opposed these provisions when they were originally proposed because it considered them to be cost-shifting provisions that would override current VA authority. When the provisions were enacted as part of the ACA, the VA's response was to produce a legal opinion which provided the VA with the complete authority—through "sharing agreements" not mandated by 25 U.S.C. § 1645(c)—to dictate, control and completely close the process of reimbursing Indian tribes and tribal organizations for health care provided to eligible veterans, contrary to the plain language of the statute.

ARGUMENT

I. THE VETERANS' JUDICIAL REVIEW ACT DOES NOT APPLY TO PRECLUDE THIS COURT FROM REVIEWING THE VA'S ACTIONS.

A. Standard of review for Rule 12(b)(1) motions attacking subject matter jurisdiction

When addressing a motion to dismiss for lack of subject matter jurisdiction, a court is generally not bound by the factual allegations of the complaint. Pursuant to Fed. R. Civ. P. 12(b)(1), the court "may 'hear evidence regarding jurisdiction' and 'resolv[e] factual disputes where necessary.'" *Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009) (quoting *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983)). A Rule 12(b)(1) motion may be either *facial*, where the court's inquiry is limited to the allegations in the

complaint; or *factual*, where the court may look beyond the complaint to consider extrinsic evidence. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "If the moving party converts 'the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction.'" *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004) (quoting *Safe Air*, 373 F.3d at 1039). Accordingly, in deciding jurisdictional issues, the court is not bound by the factual allegations within the complaint. *Augustine*, 704 F.2d at 1077.

B. This unique matter is excluded from review under the VJRA by the plain language of 38 U.S.C. § 511.

The VA contends that the Veterans' Judicial Review Act ("VJRA"), Pub. L. 100-687, 102 Stat. 4105 (Nov. 18, 1988) provides the exclusive vehicle for the Community to challenge the VA's unlawful actions. The VA is incorrect. 38 U.S.C. § 511(a), the primary codification of the VJRA's administrative review process, provides:

> The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law *that affects the provision of benefits by the Secretary to veterans* or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

(emphasis added). This is admittedly a broad provision; however, it clearly does not reach the Community's claims in this matter.

It is well-settled in the Ninth Circuit that "statutory interpretation begins with the plain language of the statute." *Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010)

(quoting *United States v. Chaney*, 581 F.2d 1123, 1126 (9th Cir. 2009)). "The preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there. Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous."*Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009) "In statutory interpretation, courts must adhere to the plain language of a statute unless "literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters."" *Resolution Trust Corp. v. Bayside Developers*, 43 F.3d 1230, 1236 (9th Cir. 1995) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

The VA's analysis of § 511(a)'s plain language misconstrues the phrase "under a law that affects the provision of benefits," and disregards two critical terms that follow that phrase—the benefits must be provided *by* the Secretary and *to* veterans. Doc 15 at 6. First, it is clear by this language that § 511(a) is concerned with laws that affect a veteran's eligibility for VA benefits. 25 U.S.C. § 1645 does not affect a veteran's eligibility for benefits. Nothing in Section 1645(c) either expands or diminishes a veteran's right to either IHS or VA benefits. It merely shifts which federal budget bears the burden of paying for benefits a veteran is otherwise eligible for. No eligibility or any other provisions affecting the provision of benefits to a veteran are affected at all. Nor does Section 1645(c) affect any benefits provided "by the Secretary to veterans." By definition, Section 1645(c) only affects benefits that are provided through IHS or a tribal health facility.

One need only look at the ordinary meaning of these words to see that § 511(a) is

concerned with decisions by the VA with regard to benefits that the VA administers to veterans, and does not address the benefits conferred by Section 1645(c) which, by definition, are provided, administered or adjudicated through a federal benefit scheme (in Title 25) wholly separate from the VA (Title 38). Under Section 1645(c), the only thing to be provided is reimbursement from the VA to an Indian tribe or tribal organization "to beneficiaries eligible for services from" the VA. While § 511(a) governs an eligibility dispute between a veteran and the VA, it would not affect reimbursement obligations under Section 1645(c) by the VA for individuals where eligibility is not in dispute. In the case at bar, VA has categorically denied all reimbursements, *regardless of eligibility*.

25 U.S.C. § 1645(c) provides:

> **(c) Reimbursement**
> The Service, Indian tribe, or tribal organization shall be reimbursed by the Department of Veterans Affairs or the Department of Defense (as the case may be) where services are provided *through* the Service, an Indian tribe, or a tribal organization *to* beneficiaries eligible for services from either such Department, notwithstanding any other provision of law.

(emphasis added). The plain language of Section 1645(c) unambiguously excludes it from the broad scope of § 511(a). Section 1645(c) is clear: (1) the reimbursement for services provided through IHS, an Indian tribe or tribal organization is mandatory, using the term "shall"; (2) by its express terms, Section 1645(c) applies only to services provided "through" IHS, an Indian tribe (such as the Community) or tribal organization (such as GRHCC), and not the provision of benefits by the VA to veterans; and (3) the reimbursement obligation of Section 1645(c) applies "notwithstanding any other provision of the law."

Instead of a plain language analysis of § 511(a), the VA relies heavily upon case law

which broadly construes the scope of § 511(a), without any consideration for the specific language of Section 1645(c). This analysis is primarily from three cases: *Hicks v. Veterans Admin*., 961 F.2d 1367 (8th Cir. 1992), *Blue Water Navy Veterans Ass'n v. McDonald*, 2016 WL 4056093 (D.C.Cir. 2016) and *Veterans for Common Sense v. Shineski*, 678 F.3d 1013 (9th Cir. 2012) (en banc). The Community believes that the direction from the Ninth Circuit on interpreting § 511(a) provides a clear answer here.

Veterans for Common Sense was an action brought by two non-profit organizations "to remedy delays in the provision of mental health care and the adjudication of service-connected disability compensation claims *by* the VA." 678 F.3d 1016 (emphasis added). The Ninth Circuit's thorough discussion of the history of the judicial review of veterans' benefits determinations and the enactment of the VJRA provides specific guidance to this Court on the question before it. "Congress indicated that the Veterans Court's authority would extend to "*all* questions involving benefits under laws *administered by* the VA."" 678 F.3d at 1021 (quoting H.R. Rep. No. 100-963, at 5) (emphasis of "all" in original; emphasis of "administered by" added). Section 1645(c) is not administered by the VA.

In summarizing the limitations of the VJRA, the Ninth Circuit said, "Congress has expressly disqualified us from hearing cases related to *VA benefits* in 511(a)." 678 F.3d at 1023 (emphasis added). In its judicial construction of § 511, the Court cited its prior decision in *Littlejohn v. United States*, 321 F.3d 915 (9th Cir. 2003), in which it held that although the Federal Circuit is the only Article III court with jurisdiction to hear challenges to VA determinations regarding disability benefits, it could hear an FTCA claim involving

negligence against VA physicians "because doing so would not "possibly have any effect on the benefits he has already been awarded."" 678 F.3d 1023 (quoting *Littlejohn*, 321 F.3d at 921). After discussing prior cases, including cases from other circuits, the Ninth Circuit concluded that § 511 "precludes jurisdiction over a claim if it requires the district court to review "VA decisions that relate to benefits decisions."" 678 F.3d at 1925 (quoting *Beamon v. Brown*, 125 F.3d 965, 971 (6th Cir. 1997)). Hearing this matter would not have any effect on the benefits actually received by any veteran. In fact, the VA has refused to provide any reimbursements regardless of whether a veteran is clearly eligible for benefits from both the VA and GRHCC.

The Ninth Circuit further explained that the preclusion of judicial review of decisions under § 511 extends not only to cases "where adjudicating veterans' claims requires the district court to determine whether the VA acted properly in handling a veteran's request for benefits, but also to those decisions that may affect such cases." 678 F.3d at 1025-26 (citations omitted). This case is neither a case involving a question of whether the VA acted properly in handling a veteran's claim nor is it a decision that would affect such cases. The broad interpretation of § 511 in *Veterans for Common Sense* clearly does not encompass the claims made in this case or the unique nature of Section 1645(c).

The Community's position is bolstered by the Ninth Circuit's subsequent decision in *Recinto v. U.S. Dep't of Veterans Affairs*, 706 F.3d 1171 (9th Cir. 2013). *Recinto* involved a challenge to VA decisions regarding payments to veterans under the Filipino Veterans Equity Fund. 706 F.3d at 1172. In its first decision following its en banc decision in *Veterans*

for Common Sense, the Ninth Circuit limited the scope of § 511 to whether the claims made required the court to consider individual veterans' benefits decisions:

> **Stated another way, if reviewing Plaintiffs' claim would require review of the circumstances of individual benefits requests, jurisdiction is lacking.** *See id.* at 1034. "Benefits" include "any payment, service, ... or status, entitlement to which is determined under laws administered by the Department of Veterans Affairs pertaining to veterans and their dependents and survivors." *Id.* at 1026 (citing 38 C.F.R. § 20.3(e)). We must therefore evaluate both of Plaintiffs' claims to determine whether they require us to consider veterans' *individual benefits decisions*.

706 F.3d at 1175 (citing *Veterans for Common Sense*) (emphasis added). This matter does not require the Court to consider individual benefits decisions. Like the facial equal protection challenge in *Recinto*, this case requires only an evaluation of the text of the statute requiring the VA to reimburse IHS, Indian tribes or tribal organizations. As in *Recinto*, "[t]o assess this claim we need not assess whether individual claimants have a right to veterans benefits." 706 F.3d at 1176.

A review of appellate court decisions in which courts have found that § 511(a) precludes judicial review shows that many meet a common criterion: They are "group challenges" brought by veterans' organizations on behalf of veterans or putative class action lawsuits. *Veterans for Common Sense* (two non-profits groups representing class of veterans); *Recinto* (group of Filipino World War II veterans and their widows); *Blue Water Navy Vietnam Veterans* (organizations that represented "blue water" Navy veterans during Vietnam War); *Beamon* (putative class action by honorably discharged war veterans); *de Fernandez v. U.S. Dep't of Veterans Affairs*, 2013 WL 623240 (N.D. Cal. 2013) (putative class action brought by Filipino World War II veterans and non-profit organization). This

case involves a unique issue that is *not* analogous to a group challenge to veteran benefits decisions.

The VA relies on a definition of "benefit" from 38 C.F.R. § 20.3(e). As with the plain language analysis of § 511(a), the VA's convoluted reasoning fails to consider the plain language of the statute (which the rule tracks). Section 1645(c) is not a law administered by the VA. In addition, because Section 1645(c) is not a law administered by the VA, the VA is not entitled to any deference to its interpretation. Finally, it is worth noting that the definition of "benefit" is from 38 C.F.R. Part 20, which are the rules of practice for the Board of Veterans' Appeals.

A good question for the VA in this matter would be what would happen if the Community attempted to use the VA's administrative process.[1] Long-standing precedent from the United States Court of Veterans Appeals holds that the Board of Veterans' Appeals lacks jurisdiction to review the Secretary's grant of or refusal to grant equitable relief. *Darrow v. Derwinski*, 2 Vet.App. 303 (1992); *Edwards v. Peake*, 22 Vet.App. 29 (2008). In holding that the appellant was not entitled to the remedy of equitable tolling, the court noted that there was "no authority empowering the Court to grant equitable relief to extend a deadline other than that which permits the Court to obtain jurisdiction over the merits of his case." *Peake*, 22 Vet.App. at 37. Thus, "the equitable relief sought by the appellant is solely

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[1] In the "meet and confer" prior to the filing of the First Amended Complaint, while taking the position that the Community and GRHCC must proceed under the VJRA, defendants' attorneys were unable to guarantee that the Board of Veterans' Appeals would have jurisdiction over the matter.

available at the discretion of the Secretary." *Id.*

Section 1645(c) is a unique statute and the cases involving group challenges to veterans' benefits do not fit this situation. Under the plain language of 38 U.S.C. § 511(a), the claims in this case do not fall under the scope of the VJRA.

II. THE ACTIONS OF THE VA MEET THE REQUIREMENTS FOR "FINAL AGENCY ACTION" UNDER THE ADMINISTRATIVE PROCEDURES ACT.

The VA argues that its actions do not constitute a final agency action under the judicial review provisions of the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701-706. The APA says that the following actions are reviewable:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 704. Agency action under the APA includes "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). In this case, the VA's actions clearly meet the "final agency action" requirement. After more than two years of attempting to resolve these issues with the VA, the VA not only failed to act, but they informed the Community and GRHCC that they would not act without the filing of a lawsuit.

In their First Amended Complaint, the Community and GRHCC laid out the facts

surrounding the VA's actions following enactment of Section 1645(c). Doc. 12. The VA was long aware of the statutory proposal to strengthen Native veteran reimbursement rights and strongly opposed previous attempts to enact such rights, lobbying against them. Doc. 12 ¶¶ 32-34; Doc. 12-1. When 1645(c) was enacted, the VA failed to comply with the law and begin reimbursements, pending its efforts to develop "template" sharing agreements and without any consultation with tribal governments. Doc. 12 ¶¶ 35-37. The VA's position was based upon its internal interpretation of Section 1645(c) and 25 U.S.C. § 1623(b), as memorialized in a legal opinion (dated March 4, 2011) authored by William A. Gunn, Esq., General Counsel for the VA, and attached as **Exhibit 1**. Following attempts to negotiate an agreement with the VA, under a reservation of its rights, GRHCC was finally told that the VA would not change its position on reimbursements unless the Community sued the federal government and prevailed in court. Doc. 12 ¶¶ 55-56. While the VA's position was clearly a final agency action, in light of the VA's argument in this case, the Community sent a follow-up letter to Defendant McDonald. **Exhibit 2**. No response has been received.

In *Bennett v. Spear*, the Supreme Court identified two requirements for determining what constitutes final agency action under the APA. 520 U.S. 154, 177-78 (1997). "First, the action must mark the 'consummation' of the agency's decisionmaking process…." *Id.* (citation omitted). "[S]econd, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* (quotation omitted). Applying well-developed precedent from the Ninth Circuit to this case, the *Bennett* test is clearly met by the VA's legal opinion and subsequent actions consistent with the legal

opinion.

In a case similar to this, the Ninth Circuit recently held that actions based upon an informal legal opinion were sufficient to constitute final agency action. *Navajo Nation v. U.S. Dept. of the Interior*, 819 F.3d 1084 (9th Cir. 2016). In *Navajo Nation v. U.S. Dept. of the Interior*, the Court held that the decision to apply NAGPRA to the remains and objects on the Navajo Reservation, based upon an opinion by the DOI Solicitor, constituted final agency action. 819 F.3d at 1091. The Court found that the National Park Service's *legal determination* that NAGPRA's inventory requirements applied to remains and object from Canyon de Chelly "marked the consummation of the agency's decisionmaking process as to that issue." *Id.* (citation omitted). Unlike this case, in which the VA issued and acted pursuant to a formal legal opinion, the NPS refused the Navajo Nation's request for a formal opinion, stating that the Solicitor's opinion was "informally given" and "[t]hat was the opinion they gave." *Id.*

The core questions in determining final agency action are (1) whether the agency has completed its decision-making process; and (2) whether the result directly affects the parties. *Indus. Customers of Nw. Utils. v. Bonneville Power Admin.*,408 F.3d 638, 646 (9th Cir. 2005). Agency action is final if it "amounts to a definite statement of the agency's position," "has a direct and immediate effect on the day-to-day operations of the subject party," or requires "immediate compliance." *Oregon Natural Desert Ass'n v. U. S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir.2006) (internal quotes omitted). The court must focus on the practical and legal effects of the agency action and interpret the finality element in a pragmatic and

flexible manner. *Id.* The VA's actions in this matter clearly meet these standards.

While the VA does not address *Bennett's* second prong, the Community contends that the result of the VA's completed decision making process "is one that will directly affect the parties" because it requires sharing agreements as an absolute condition of reimbursement and the VA has clearly and unambiguously taken the position that it will not reimburse in the absence of a sharing agreement. Moreover, the proposed sharing agreement would require GRHCC to waive reimbursement rights beyond what is permitted in Section 1645(c).The practical effect of the VA's interpretation of 1645(c) allows it to avoid its statutory obligation to reimburse Indian tribes and tribal organizations (with or without a sharing agreement) and the interpretation has a direct and immediate effect on the day-to-day operation of GRHCC.

The VA misinterprets the action challenged and defends itself by claiming—without record support—that "it has taken action under the statute by reimbursing IHS and other tribes with which it has entered sharing arrangements." However, if Section 1645(c) does not require sharing arrangements as a condition for reimbursement, as its plain language dictates, then the VA's argument is irrelevant and the Community and GRHCC are entitled to the relief sought, which is to hold the agency's actions unlawful under 5 U.S.C. § 706(2).

III. THE PLAIN LANGUAGE OF 25 U.S.C. § 1645(c) REQUIRES THE VA TO REIMBURSE GRHCC FOR HEALTH CARE PROVIDED TO ELIGIBLE VETERANS.

A. Standard of Review for Rule 12(b)(6).

The VA also seeks dismissal of the First Amended Complaint pursuant to Fed. R. Civ.

P. 12(b)(6). Unlike the VA's Rule 12(b)(1) motion, which requires the court to consider and weigh facts presented by the parties, a motion made under Rule 12(b)(6) is a more hypothetical exercise. As this Court explained in *Ares Funding, L.L.C. v. MA Maricopa, L.L.C.*:

> "A Rule 12(b)(6) motion tests the legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.2001). When reviewing a motion to dismiss, the Court accepts as true all material allegations in the complaint and construes them in a light most favorable to the plaintiff. *Schmier v. U.S. Court of Appeals for Ninth Circuit*, 279 F.3d 817, 820 (9th Cir.2002). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1964–65, 167 L.Ed.2d 929 (2007) (internal quotations, citations, and alterations omitted).

602 F.Supp.2d 1144, 1146-47 (D.Ariz. 2009).

The Court should also keep in mind what is sometimes referred to as the "Indian canon of construction" or "*Blackfeet* presumption." "Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). "The *Blackfeet* presumption simply requires that, when there is doubt as to the proper interpretation of an ambiguous provision in a federal statute enacted for the benefit of an Indian tribe, "the doubt [will] benefit the Tribe, for ambiguities in federal law have been construed generously in order to comport with … traditional notions of sovereignty and with the federal policy of encouraging tribal independence."" *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 729 (9th Cir. 2003) (citations omitted). Section 1645(c) is clearly subject to the *Blackfeet* presumption in favor of the Community's interpretation.

While the Ninth Circuit has held that the *Blackfeet* Presumption generally gives deference to the agency's interpretation of a statute under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "where the agency's interpretation is not the result of its formal resolution of the question and is merely litigating a position, as here, *Chevron* deference does not apply." *Crow Tribal Hous. Auth. v. U.S. Dep't of Hous. & Urban Dev.*, 781 F.3d 1095, 1103 n. 6 (2015) (citations omitted). This case presents an analogous situation, where the VA is merely litigating a position, and the Court should provide no deference to the VA's substantive interpretation of Section 1645(c).

And, while the VA has previously taken the position that the same principle as the *Blackfeet* Presumption is applied to laws regarding benefits to veterans, *e.g.*, *Brown v. Gardner*, 513 U.S. 115, 117-18 (1994), the presumption referred to in *Brown v. Gardner* is in favor of individual veterans and *against* the United States and applies only in cases involving the provision of benefits to veterans.

Having established the contours of the Court's review, the Community and GRHCC turn to the statute itself.

B. The plain language of Section 1645(c) requires reimbursement and does not mandate a sharing agreement.

Again, the Community begins with the plain language of the statute. Section 1645(c) provides:

> **(c) Reimbursement**
> The Service, Indian tribe, or tribal organization shall be reimbursed by the Department of Veterans Affairs or the Department of Defense (as the case may be) where services are provided through the Service, an Indian tribe, or a tribal

> organization to beneficiaries eligible for services from either such Department, notwithstanding any other provision of law.

The VA argues that, under the plain language of Section 1645(c), its obligation to pay arises only when the VA enters into sharing agreements with IHS, Indian tribes or tribal organizations "and only under the terms negotiated in those arrangements." Doc. 15 at 17. The VA's analysis is *not* a plain language analysis; it's actually *contrary* to the plain language of the statute.

The language of Section 1645(c) is mandatory; it provides that the IHS, Indian tribe or tribal organization "shall be reimbursed by the Department of Veterans Affairs" for services provided through any of those entities to beneficiaries eligible for services from the VA. The plain language of Section 1645(c) does not refer to or require a "sharing agreement." Further, "reimbursement" is *not* "sharing," and these are terms for which the ordinary meaning is clear enough that a dictionary definition is not required. Second, the VA contends that because the title of 25 U.S.C. § 1645 is "Sharing Arrangements With Federal Agencies,"[2] that a sharing arrangement is "read" into Section 1645(c). Notwithstanding that this is *not* a plain language approach, Section 1645(a) creates a major problem with the VA's analysis—the sharing arrangements under Section 1645(a) are permissive, not mandatory. The statute provides:

> **(1) In general**
> The Secretary *may enter into* (or expand) arrangements for the sharing of medical facilities and services between the Service, Indian tribes, and tribal organizations and the Department of Veterans Affairs and the Department of Defense.

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[2] Neither the Community nor GRHCC are federal agencies.

25 U.S.C. § 1645(a) (emphasis added).

Returning for a moment to plain meaning, if the plain meaning of a statute is, well, plain, the analysis stops there. It is where the statutory text is *ambiguous* that the court "may look to other interpretive tools, including the legislative history in order to determine the statute's best meaning." *In re HP Inkjet Printer Litigation*, 716 F.3d 1173, 1180-81 (9th Cir. 2013) (citations omitted). Not only is the plain language of Section 1645(c) unambiguous, the VA makes *absolutely no effort* to argue that it *is* ambiguous, which is necessary for the court to undertake the analysis it seeks in its motion to dismiss.

C. The VA's interpretation of Section 1645(c) is not supported by the context of the statute.

The VA argues that Section 1645(c) must be read in the context of the statute as a whole and that such a reading supports their construction. The VA claims that, "read in full," Section 1645 "lays out instructions for the facilitation of sharing agreements." Doc. 15 at 15. The VA contends that Section 1645(c) "discusses the reimbursement that must occur under the sharing agreements" and that 25 U.S.C. § 1645(d) "gives instruction on the proper construction of the section." *Id*. The VA reasons that, because Section 1645(c) identifies the same entities as 25 U.S.C. § 1645(a), they must be read together. However, the exclusion of Indian tribes and tribal organizations in 25 U.S.C. § 1645(d) appears to undercut the VA's analysis and seems to suggest that 25 U.S.C. § 1645 covers different issues relating to health care provided to Native American veterans. 25 U.S.C. §§ 1645(a) and (b) address sharing agreements (for facilities) that may be entered into between the "Secretary" of IHS and the

VA. The statute does not address, require, or even permit any form of direct agreements between the VA and Indian tribes or tribal organizations.

This case is not unlike *Campbell v. Allied Van Lines, Inc.*, 410 F.3d 618 (9th Cir. 2005), which involved the award of attorneys' fees to shippers who successfully sued carriers of household goods. The issue before the Ninth Circuit was the construction of the attorneys' fees provision of 49 U.S.C. § 14708(d). The carriers objected to the award of attorneys' fees to the shippers because the litigation was not in the context of a dispute resolution (such as arbitration) and the title of section 14708 is "Dispute settlement program for household goods carriers." 49 U.S.C. § 14708. Section 14708(d) allows the shippers to recover fees "in any court action to resolve a dispute."[3] The carriers argued that the fee provisions presumed participation in the arbitration program described in the rest of §14708.

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[3] 49 U.S.C. § 14708(d) provides:

> (d)ATTORNEY'S FEES TO SHIPPERS.—In any court action to resolve a dispute between a shipper of household goods and a carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 concerning the transportation of household goods by such carrier, the shipper shall be awarded reasonable attorney's fees if—
> (1) the shipper submits a claim to the carrier within 120 days after the date the shipment is delivered or the date the delivery is scheduled, whichever is later;
> (2) the shipper prevails in such court action; and
> (3)(A) the shipper was not advised by the carrier during the claim settlement process that a dispute settlement program was available to resolve the dispute; (B) a decision resolving the dispute was not rendered through arbitration under this section within the period provided under subsection (b)(8) of this section or an extension of such period under such subsection; or (C) the court proceeding is to enforce a decision rendered through arbitration under this section and is instituted after the period for performance under such decision has elapsed.

410 F.3d at 620. Based upon the plain language of the statute, the Ninth Circuit disagreed.

While "mindful of the need to construe the statute as a whole," the Court saw "no tension between our interpretation of the attorney's fees provision and the arbitration program." 410 F.3d at 621 (citation omitted). While the carriers argued that the interplay between sections of the statute precluded a plain language interpretation, the Court was not persuaded. *Id.* The Court also rejected the reliance of other courts on §14708's title to support an alternative interpretation:

> Section 14708 may be entitled "Dispute settlement program for household goods carriers," but that does not give us free rein to ignore the plain language of subsection (d).

Id. In *Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, the Supreme Court explained:

> That the heading of [a section] fails to refer to all the matters which the framers of that section wrote into the text is not an unusual fact…. [T]he title of a statute and the heading of a section cannot limit the plain meaning of the text. *For interpretive purposes, they are of use only when it sheds light on some ambiguous word or phrase.*

331 U.S. 519, 528-29 (1947) (emphasis added). The Court in *Campbell* concluded, "[t]here is nothing ambiguous about the text in question here." 410 F.3d at 622.

Noting that Section 14708(d) did not present an exceptional situation justifying departure from the plain language of the statute, the Ninth Circuit stated that it would "decline to add a condition that is conspicuously absent from the text" when there is no inconsistency in the statute as written. 410 F.3d at 622. The VA's argument here—which is to add an additional condition to Section 1645(c) which is not there—is identical to the argument rejected in *Campbell*.

The VA's citation to 38 U.S.C. § 8111, which authorizes sharing between the VA and

the Department of Defense is particularly illustrative. While it does refer to sharing arrangements, they are not permissive as the VA suggests. 38 U.S.C. § 8111(a) provides that "[t]he Secretary of Veterans Affairs and the Secretary of Defense shall enter into agreements and contracts for the mutually beneficial coordination, use, or exchange of use of the health care resources of the Department of Veterans Affairs and the Department of Defense with the goal of improving the access to, and quality and cost effectiveness of, the health care provided by the Veterans Health Administration and the Military Health System to the beneficiaries of both Departments." If anything, 38 U.S.C. § 8111 suggests that Congress knows the difference between a mandatory provision and a permissive provision.

The Court should reject the VA's context argument and stick with the plain language of Section 1645(c).

D. The legislative history of Section 1645(c) does not support the VA's construction.

When enacted, the Patient Protection and Affordable Care Act ("ACA") included S. 1790, 11th Cong. (2009), the Indian Health Care Improvement Reauthorization and Extension Act of 2009. The purpose of S. 1790 was to fulfill the special trust responsibility of the United States to Indian tribes and their members. The provisions of S. 1790, however, were not new to the Congress and had been previously introduced as H.R. 1328, the Indian Health Care Improvement Act Amendments of 2007. 110th Cong. (2007). Section 406 of H.R. 1328 is identical to Section 1645, including a reimbursement provision identical to Section 1645(c).

When H.R. 1328 was introduced, the VA interpreted it *exactly* the same as the

Community interprets Section 1645(c) and contrary to the position it takes in this litigation. Then Acting Secretary Gordon R. Mansfield wrote identical letters to members of Congress urging them to strike the provision from the bill. Doc. 12-1. Why? Because the provision "would require the Department of Veterans Affairs (VA) to reimburse the Indian Health Service (IHS), tribes, or tribal organizations whenever a VA-eligible beneficiary chooses to receive, and receives, care from any of those entities." *Id.* The VA noted that, "[t]his provision would require the VA to pay for care without having any control over how that care is provided." *Id.* In "strongly objecting" to the provision, the VA pleaded that it "should not be required to pay for the care of all veterans in IHS, tribe, or tribal organization facilities." *Id.* Like the Community in this lawsuit, the VA correctly recognized Section 1645(c) as a cost-shifting provision, although it now seeks to alter its legal analysis to avoid its responsibilities under the law.

As opposed to an equivocal statement from one Senator in the *Congressional Record* and an incomplete sentence from the *Congressional Research Service*, Doc. 15 at 20-21,[4] the Community refers the Court to the House Report on H.R. 1328 and its section-by-section analysis. As to Sections 406 (identical to Section 1645) and 407 (identical to 25 U.S.C. § 1623(b)), the report states:

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[4] Senator Murray's statement uses the conjunction "and" before the phrase "it requires reimbursement to the IHS, tribes or tribal organizations." Doc. 15 at 20 (citation omitted). The statement from the *Congressional Research Service* is worse, as the clause at the end of the paragraph quoted is an incomplete clause. Doc. 15 at 21 (citation omitted). The Community and GRHCC contend that the House Report on H.R. 1328, as it addresses the identical language contained in Sections 1645(c) and 1623(b), is more credible than two equivocal statements from non-authoritative sources.

> ***Section 406. Sharing arrangements with Federal agencies***
> Section 406 authorizes the Secretary to enter into or expand arrangements for the sharing of medical facilities and services between the Service, Indian Tribes, and Tribal Organizations and the Department of Veterans Affairs and the Department of Defense. The Secretary is prohibited from taking certain actions that would: (1) Impair the priority access of any Indian to health care services provided through the Service and the eligibility of any Indian to receive health services through the Service; (2) the quality of health care services provided to any Indian through the Service; (3) the priority access of any veteran to health care services provided by the Department of Veterans Affairs; (4) the quality of health care services provided by the Department of Veterans Affairs or the Department of Defense; or (5) the eligibility of any Indian who is a veteran to receive health services through the Department of Veterans Affairs. *The Department of Defense or the Department of Veterans Affairs shall reimburse the Service, Indian tribe, or Tribal Organization for services provided to beneficiaries eligible for services from either Department.*
>
> ***Section 407. Payor of last resort***
> Section 407 mandates that, notwithstanding any federal, state, or local law to the contrary, the Indian Health Programs and health care programs operated by Urban Indian Organizations are the payor of last resort for services provided to eligible persons.

H.R. Rep. 110-564 Pt. 1, 110th Cong., 121 (2008) (emphasis added). If there is a context within which to interpret Section 1645(c), it would be with the payor of last resort provision which was ultimately codified at 25 U.S.C. § 1623(b). The cost-shifting and payer of last resort provisions have appeared together in legislation from at least the introduction of H.R. 1328 and through the adoption of S. 1790.

The legislative history of Section 1645(c) supports the Community and GRHCC's position that it is a cost-shifting provision intended to alleviate the burden on an underfunded system.

CONCLUSION

The Court should deny the motion to dismiss.

DATED this 9th day of September, 2016.

Respectfully submitted,

GILA RIVER INDIAN COMMUNITY

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-and-

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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2016, I electronically transmitted this document to the Clerk's Office of the United States District Court for the District of Arizona using the CM/ECF system for electronic filing and service of this document and a Notice of Electronic Filing to the following CM/ECF registrants:

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